Last page of docket

SHDKT PROCEEDINGS AND ORDERS DATE: [07/06/94]

CASE NBR: [93106577] CSY STATUS: [DECIDED]
SHORT TITLE: [Davis, Edward Lee]
VERSUS [Minnesota] DATE DOCKETED: [110193]

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	DATE	NOTE	PROCEEDINGS & ORDERS
1	Nov 1 1993	D	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Nov 24 1993		Brief of respondent Minnesota in opposition filed.
4	Dec 2 1993		DISTRIBUTED. January 7, 1994 (Page 10)
5	Apr 18 1994		REDISTRIBUTED. April 22, 1994 (Page 16)
7	Apr 25 1994		REDISTRIBUTED. April 29, 1994 (Page 14)
9	May 9 1994		REDISTRIBUTED. May 13, 1994 (Page 27)
11	May 16 1994		REDISTRIBUTED. May 20, 1994 (Page 14)
13	May 23 1994		Petition DENIED. Concurring opinion by Justice Ginsburg. Dissenting opinion by Justice Thomas with whom Justice Scalia joins. (Detached opinion.)

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ORIGINAL

No. 93-6577

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

Supreme Court, U.S.
FILED
NOV 1 1993
OFFICE OF THE CLERK

EDWARD LEE DAVIS,
a/k/a EDDIE DAVIS,

Petitioner,

v.

STATE OF MINNESOTA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE

MINNESOTA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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38 pp

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QUESTION PRESENTED

May a prosecutor justify the exclusion of an African-American citizen from jury service after a challenge pursuant to Batson v. Kentucky, 476 U.S. 79 (1986), on the basis of the citizen's religious affiliation?

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

EDWARD LEE DAVIS, a/k/a EDDIE DAVIS, Petitioner,

v.

STATE OF MINNESOTA, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

Petitioner, Edward Lee Davis, a/k/a Eddie Davis, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Minnesota Supreme Court entered in the above entitled matter on August 27, 1993.

OPINIONS BELOW

The Opinion of the Minnesota Supreme Court is reported as State v. Davis, 504 N.W.2d 767 (Minn. 1993), and appears in Appendix A of this Petition. The unpublished opinion of the Minnesota Court of Appeals appears in Appendix B to this Petition. A copy of the final judgment appears in Appendix C to this Petition.

JURISDICTION

Petitioner was convicted by a jury of aggravated robbery and filed a timely appeal. On January 5, 1993, the Minnesota Court of Appeals issued an unpublished opinion affirming petitioner's conviction. The Minnesota Supreme Court accepted the case for further review and issued an opinion affirming petitioner's conviction on August 27, 1993, by a 4-3 decision. A petition for rehearing was denied and final judgment was entered by the Minnesota Supreme Court on October 1, 1993. This Court's jurisdiction is invoked under Title 28, U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION AMENDMENT I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people to peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION AMENDMENT XIV:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case arose from an August 1, 1991, armed robbery of a fast food restaurant in St. Paul by masked gunmen. Petitioner,

who is an African-American, was arrested one week later and formally charged with Aggravated Robbery.

During the jury selection at trial, no jurors were struck for cause. The defense exercised four of its five alloted peremptory challenges and the State used one of its three alloted peremptory strikes. The State's peremptory challenge was used to strike an African-American man from the jury panel and defense counsel objected to the strike under Batson v. Kentucky, 476 U.S. 79 (1986). The prosecutor responded as follows:

> I'm very familiar with the case law and I fully expected such a motion. I want to point out that this juror in many respects would have been a very good juror for the State and [sic] that he was employed and has been for some time, is a family man. I had no reason to suspect that simply because he was a young black male he would unduly sympathize with the defendant. However it was highly significant to the State and I'm putting on the record that the man was a Jahovah [sic] Witness. I have a great deal of familiarity with the sect of Jahovah's Witness. I would never, if I had a preemptory [sic] challenge left, strike [--] or fail to strike a Jahovah Witness from my jury. In my experience with the Jehovah Witness faith [,] that faith is very integral to their daily life in many ways, many Christians are not. That was re-enforced at least three times a week he goes to church for separate meetings. The Jahovah Witness faith is of a mind the higher powers will take care of all things necessary. In my experience Jahovah Witness are reluctant to exercise authority over their fellow human beings in this Court House. I did not feel it appropriate to further pry into his -- into this line of questioning because in no way does the case law prohibit me from exercising a challenge on that grounds and that is exactly why I struck this person.

(The relevant pages from the trial transcript have been reproduced at Appendix D to this petition). The trial court then ruled that the peremptory challenge would stand.

On direct appeal, the Minnesota Court of Appeals rejected petitioner's claim that it was improper for the prosecutor to

exercise a peremptory challenge on the basis of a venire panel member's religious affiliation.

The Minnesota Supreme Court granted petitioner's request for further review. By a 4-3 decision, the Court affirmed petitioner's conviction. The majority decided that the Batson procedure for challenging peremptory jury strikes based upon race should not be extended to bar such strikes when based upon the juror's religious affiliation. A petition for rehearing was filed wherein it was argued that at the very least, in a situation where Batson had been invoked because a prima facie case of racial discrimination had been made, the reason tendered for the strike had to be not only neutral with respect to race but also neutral with respect to other protected classes such as a juror's religious affiliation. The petition was denied without opinion.

REASONS FOR GRANTING THE WRIT

THIS COURT IS CURRENTLY CONSIDERING THE ISSUE OF WHETHER BATSON-TYPE CHALLENGES ARE AVAILABLE IN SITUATIONS INVOLVING CLAIMS OF GENDER BIAS AND THIS CASE PRESENTS THE OPPORTUNITY TO DECIDE 1) WHETHER BATSON-TYPE CHALLENGES ARE AVAILABLE IN SITUATIONS INVOLVING CLAIMS OF RELIGIOUS BIAS AND 2) EVEN IF BATSON IS AVAILABLE ONLY IN SITUATIONS WHERE A PRIMA FACIE CASE OF RACIAL DISCRIMINATION HAS BEEN ESTABLISHED, WHETHER A JUSTIFICATION FOR THE EXERCISE OF THE PEREMPTORY CHALLENGE IN SUCH A CASE ON THE BASIS OF THE JUROR'S RELIGIOUS AFFILIATION VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT AS WELL AS THE FREE EXERCISE OF RELIGION PROTECTION OF THE FIRST AMENDMENT.

In Batson v. Kentucky, 476 U.S. 79 (1986), this Court ruled that where a prima facie case has been established that a litigant has used peremptory strikes in an individual case to exclude citizens from jury service based upon their race, the

litigant will then be required to provide a race-neutral reason for the peremptory strike or it is to be disallowed. The ruling was based upon a recognition that use of peremptory challenges for such a discriminatory purpose is barred by the Equal Protection Clause as well as a conclusion that the prior test set forth in Swain v. Alabama, 380 U.S. 202 (1965), requiring proof of systematic exclusion of citizens within a protected group over time to establish an Equal Protection claim, was not an adequate response to the historical evidence of racist manipulation in the jury selection process.

Since Batson, there have been divergent lower court decisions as to whether the procedural device set forth in that case should be applied to citizens with other group affiliations such as gender, national origin or religious affiliation which are entitled to protection under the Constitution to shield them from discrimination in the jury selection process. This Court will be considering the question this term in the context of a challenge to gender based strikes in the case of J.E.B. v. State ex rel. T.B., No. C92-1239.

This case presents the Court with the opportunity to determine whether Batson offers protection against religious discrimination in the jury selection process. If the Batson challenge extends to gender, then it should also extend to religious affiliation. While there may not be an historical record of widespread religious discrimination in the jury selection process in this country, that does not mean that acts

of religious bigotry in this context are any more acceptable than acts of gender (or racial) discrimination. Citizens in this country should not have to relive the experiences of their forebears who came to this continent to escape government sanctioned religious discrimination in their homelands before our Courts will act to enforce the protection guaranteed under the First and Fourteenth Amendments from exclusion from any emolument of citizenship because of affiliation with a religious group.

Should this Court conclude in J.E.B. that the Batson procedure should be available in situations to address situations of gender-based bias in the jury selection process, then surely it must also be extended to address situations of bigotry in the exercise of peremptory challenges based upon religious affiliation.

Even if this Court should conclude in J.E.B. that the Batson procedure is available only in cases where a prima facie case of racial discrimination has been established, this case still presents the issue of whether a litigant who is called upon through Batson to justify a peremptory strike which on its face seems to be on the basis of race may nevertheless justify the strike on the basis of another group bias such as religion.

Whatever the policy reasons might be in favor of permitting litigants to remove a potential juror without giving any reason based upon concerns about the juror's ability to fairly decide the case which do not rise to the level to permit a challenge for cause, in this case, the veil of secrecy otherwise attendant to

the peremptory challenge had already been lifted because the challenged venire panel member was a minority. That being the case, while it was obviously required under Batson that the reason tendered for the removal be race-neutral, surely the removal cannot be justified upon the ground of another group affiliation which enjoys constitutional protection.

The benefits of the permeptory challenge to the ultimate truth-finding process in jury trials may be such that it is allowed to exist unfettered, except in cases where a prima facie case of racial discrimination is made, even knowing that there may be instances of bias that would never be allowed in other contexts such as housing, employment and the like. However, in a situation where a litigant has been called upon to explain the reason for the peremptory strike, to then allow the strike knowing full well that it was done on a basis that is repugnant to the Federal Constitution amounts to court-sanctioned bigotry.[1]

The de facto decision of the Minnesota Supreme Court that Batson challenges can be met with an explanation that evinces a

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[1]In this case, where the juror was affiliated with the Jehovah's Witness' church, the prosecutor chose to exclude him from jury service because of her perceptions as to that church's doctrines and that those doctrines would cause him to be unable to act as a responsible juror without any individualized voir dire to verify that this individual ascribed to the doctrines of the church which concerned the prosecutor. The prosecutor's action was the equivalent of summarily removing all Roman Catholics from juries empanelled to try cases involving defendants arrested for disorderly conduct in antiabortion rallies merely because of the Roman Catholic church's official doctrine on abortion without individualized voir dire of those jurors as to whether their ability to judge the case would be affected by the doctrine of their church.

bias against a citizen's religious affiliation does not stand alone. E.g., Chambers v. State, 724 S.W.2d 440 (Tex.App.1987); (explanation that two minority juror struck because of their affiliation with the Church of Christ and Jehovah's Witness Church held sufficient to answer Batson challenges); Salazar v. State, 745 S.W.2d 385 (Tex.App.1987) (minority juror's affiliation with Seventh Day Adventist church adequate to meet Batson challenge); United States v. Clemmons, 892 F.2d 1153 (3rd Cir.1989), cert. denied, 496 U.S.927 (1990) (prosecutor's assumption from juror's name that he was a Hindu and unarticulated concerns that this religious affiliation would affect juror's ability to be fair held sufficient).

On the other hand, other Courts which have expressly expanded the scope of Batson-type challenges to other group affiliations have generally included religious affiliation as a protected group and effectively ruled it is not proper to ever exclude someone from jury duty on this basis unless a showing was made that the particular religious affiliation had some relevance to the case at hand. E.g., State v. Levinson, 795 P.2d 845 (Hawaii 1990); see also State v. Gilmore, 103 N.J. 508, 511 A.2d 1150 (1986)(pre-Batson ruling barring the exercise of peremptory challenges on the basis of religious affiliation);Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499 (1979), cert. denied, 444 U.S. 881 (same); People v. Wheeler, 22 cal.3d 258, 583 P.2d 748 (1978) (same).

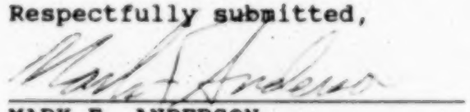
A decision from this Court on the issue of whether a Batson

challenge can be answered by an explanation for a peremptory strike that is religion-based will resolve, at least for Federal Constitutional purposes, the split in decisions among these lower courts.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Minnesota Supreme Court in this matter.

Respectfully submitted,



MARK F. ANDERSON

ATTORNEY FOR PETITIONER

APPENDIX

APPENDIX A

Opinion of Minnesota Supreme Court Reported in State v. Davis, 504 N.W.2d 767 (Minn. 1993)

THIS OPINION OR ORDER PUBLIC) OR TO
12:01 A.M. ON THE FILE DATE
APPEARING BELOW

STATE OF MINNESOTA

IN SUPREME COURT

C7-92-1037

Court of Appeals

State of Minnesota,

Respondent,

vs.

Edward Lee Davis, a/k/a
Eddie Davis, petitioner,

Appellant.

Simonett, J.
Dissenting, Wahl, Gardebring & Page, JJ.

Filed August 27, 1993
Office of Appellate Courts

SYLLABUS

The holding of Batson v. Kentucky, 476 U.S. 79 (1986), should not be extended to peremptory strikes based on religious affiliation.

Affirmed.

Heard, considered, and decided by the court en banc.

OPINION

SIMONETT, Justice.

The issue in this case is whether the holding of Batson v. Kentucky, 476 U.S. 79 (1986), should be extended to peremptory strikes on the basis of religion. In an unpublished opinion, the court of appeals concluded that because the peremptory strike was based on race-neutral grounds there was no equal protection violation, and, after reviewing the other claims of error, affirmed the defendant's conviction. We granted further review on the peremptory challenge issue and now affirm.

Defendant Edward Lee Davis, an African-American, was charged with aggravated robbery. No jurors were struck for cause during the jury selection. The defense, however, exercised four of its five peremptory strikes, while the State used one of its three. When the State used the one peremptory to strike a black man from the jury panel, defense counsel objected and asked for a race-neutral explanation. See footnote 4, infra.

The prosecutor, in response, stated for the record that the prospective juror would have been a very good juror for the State and that race had nothing to do with her decision to strike. She explained:

> However it was highly significant to the State * * * that the man was a Jahovah [sic] Witness. I have a great deal of familiarity with the sect of Jahovah's Witness. I would never, if I had a preemptory [sic] challenge left, strike [--] or fail to strike a Jahovah Witness from my jury.

She went on:

> In my experience * * * that faith is very integral to their daily life in many ways, many Christians are not. That was re-enforced at least three times a week he goes to church for separate meetings. The Jahovah Witness faith is of a mind the higher powers will take care of all things necessary. In my experience Jahovah Witness are reluctant to exercise authority over their fellow human beings in this Court House.

The prosecutor concluded her statement by saying she did not feel it appropriate "to further pry" into this matter with the juror because there was no need to when exercising a peremptory on race-neutral grounds. Defense counsel had nothing further to add, and the trial judge ruled the peremptory strike would stand.

There is no transcript of the voir dire, nor do we know the composition of the jury that was selected. In any event, the defendant concedes the State's peremptory was exercised for race-neutral reasons, but now contends that the race-neutral explanation offered by the State is constitutionally impermissible as religious discrimination.

The United States Supreme Court has not ruled on whether Batson should extend beyond race-based peremptory challenges. Batson, itself, speaks solely of the need to eradicate racial discrimination. "The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions * * *." Id. at 97-98. The Supreme Court has yet to examine directly the viability of peremptory challenges employed for discriminatory reasons other than race, although just recently it has granted certiorari to examine peremptory challenges based on gender bias. See J.E.B. v. State ex rel. T.B., 606 So.2d 156 (Ala. Civ. App. 1992), certiorari denied (Ala. 1992), certiorari granted by 113 S.Ct. 2330 (1993). In the cases the United States Supreme Court has reviewed to date involving Batson, it has extended that case's protection against purposeful racial discrimination to defendants whose race differs from that of the excluded jurors, Powers v. Ohio, 111 S.Ct. 1364 (1991), to parties in civil lawsuits, Edmonson v. Leesville Concrete Co., 111 S.Ct. 2077 (1992), and to prosecutors in criminal cases, Georgia v. McCollum, 112 S.Ct. 2348 (1992), but never to other forms of discrimination.

Because Batson was crafted as a limited exception to Swain v. Alabama, 380 U.S. 202 (1965), the Batson equal protection rationale must be read in the context of that earlier case. In Swain, the Court recounted the "very old credentials" of the peremptory strike. Id. at 212-15. Absent a showing of systematic exclusion of blacks on a petit jury, the Court held that the exercise of the peremptory against black jurors was not a denial of equal protection of the laws. "In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause." Id. at 221. "In the light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial," the Court went on to say, "we cannot hold that the Constitution

requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case." Id. at 222.

Swain was decided in 1965. In Batson, decided in 1986, the Court concluded it could no longer ignore the racist manipulation of the jury selection process and, therefore, modified use of the peremptory with respect to race. Batson, 476 U.S. at 98. Therefore, if the peremptory raises a prima facie case of racial bias, the strike may be challenged, and the proponent must then advance a race-neutral explanation for the strike which, however, need not rise to the level of cause. Id. It is against this background that the defendant-appellant asks us to extend the Batson exception to Swain to include religion.

Defendant-appellant's claim of religious discrimination is one of cross-bias, much like Powers v. Ohio, 111 S. Ct. 1364 (1991), where a white defendant raised a Batson challenge to the prosecutor's exercise of a peremptory on a black juror. Here the defendant, presumably not a Jehovah's Witness, is objecting to a peremptory challenge of a juror who is a Jehovah's Witness. Significantly, in Powers, while the Court sustained the Batson challenge, it did not do so on the theory that the defendant's equal protection rights were violated; rather, the decision was based on an equal protection violation of the excused juror's rights. Powers, 111 S.Ct. at 1370.[1] The Court further held that the defendant had standing to assert the juror's rights.

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[1] Edmonson v. Leesville Concrete Co., 111 S.Ct. 2077 (1992), extending Batson to racial bias in civil cases, also relies on the rights of the jurors. Barbara D. Underwood, in her article, Ending Race Discrimination in Jury Selection: Whose Right is it, Anyway?, 92 Colum. L. Rev. 725 (1992), argues that the prohibition against race-selected juries should be based on the equal protection rights of the jurors, not the defendant. If a race-selected jury is assumed to be racially biased against the defendant, then, logically, a defendant should be tried only before a jury of his own race, a proposition that United States Supreme Court has rejected. Id. at 730. If the claim is that jurors tend to favor defendants of their own race and disfavor defendants of other races, then, "as an empirical proposition, this is a highly controversial claim." Id. at 731. Even if this proposition were true, it is undeserving of equal protection. Id. In any event, as Underwood points out, the Court has itself stated that the Batson rule does not have a

(continued...)

The reasoning in Powers is pertinent here. Powers did not hold that striking the black juror was constitutionally impermissible because that juror might be sympathetic to the white defendant. Rather, the vice of the cross-bias exclusion was twofold: First, racial discrimination "invites cynicism respecting the jury's neutrality and its obligation to adhere to the law." Id. at 1371. Secondly, and equally important, the juror rejected solely because of skin color "suffers a profound personal humiliation * * *." Id. at 1372. And as the Court noted a year later in McCollum, 112 S. Ct. at 2354, "The need for public confidence is especially high in cases involving race-related crime * * * [and] is essential for preserving community peace in trials involving race-related crimes."

If the life of the law were logic rather than experience, Batson might well be extended to include religious bias and, for that matter, an endless number of other biases.[2] The question,

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[1](...continued)
"fundamental impact on the integrity of factfinding," quoting Allen v. Hardy, 478 U.S. 255, 259 (1986).

"The effort to trace a link between jury discrimination and verdicts, and thereby to identify a harm to litigants, is fundamentally misguided." Underwood, supra, at 774. Instead, Underwood argues the harm of jury discrimination is an institutional harm, similar to the harm of discrimination in voting rights.

[2] "The claim that the [peremptory] rule is in hopeless conflict with the [Batson] challenge is frequently linked to the suggestion that the ban on jury discrimination must inevitably expand to prohibit not only jury selection based on race, but also jury selection based on religion, national origin, gender, language, disability, age, occupation, political party, and a host of other categories. The relationship between the two points is clear: the longer the list of prohibited categories, the less room there is for a lawful challenge other than a challenge for cause." Underwood, supra, at 761.

Recently, in State v. Everett, 472 N.W.2d 864, 869 (Minn. 1991), this court declined to extend Batson to age discrimination, noting the United States Supreme Court "thus far" has limited Batson to race discrimination.

(continued...)

however, is whether the peremptory strike has been purposefully employed to perpetrate religious bigotry to the extent that the institutional integrity of the jury has been impaired, and thus requiring further modification of the traditional peremptory challenge.

We begin our analysis with a closer look at the role of the peremptory. While jurors have their individual preconceived notions and prejudices, it is assumed that they can set them aside so as to be fair and impartial. The purpose of voir dire is to test that assumption. If it is made to appear that a prospective juror cannot be fair, the juror may be challenged for cause. The peremptory is needed, however, if the challenge for cause is denied by the court. It is needed also when there is legitimate concern for a juror's fairness but this concern is insufficient to be a challenge for cause. It happens often enough that a juror expresses doubt about being able to be fair, but then opposing counsel or the judge ostensibly "rehabilitates" the juror, in this problematic situation, the peremptory is useful. Also, without the peremptory, trial counsel may be deterred from asking probing questions on voir dire for concern that any hostility inadvertently raised could not be remedied by a peremptory strike.

In other words, the peremptory gives added assurance of an accurate verdict by "resolv[ing] doubts (up to a specified number) in favor of exclusion." B. Underwood, Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?, 92 Colum. L. Rev. 725, 771 (1992). The fact that some unbiased jurors may be excused in the process is an affordable

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[2](...continued)

Justice Marshall, in his Batson concurrence, argued for eliminating peremptories entirely in criminal cases. Id. at 107. Defendant-appellant in this case attaches to his brief, as an appendix, an article by Judge Raymond J. Broderick, Why the Peremptory Challenge Should Be Abolished, 65 Temple L. Rev. 369 (1992). The author believes the peremptory is a "flaw in our judicial fabric," which should be totally abolished. Id. at 422. For a different view, see S. M. Puiczis, Edmonson v. Leesville Concrete Co.: Will the Peremptory Survive Its Battle With the Equal Protection Clause?, 25 John Marshall L. Rev. 37 (1991).

price to pay for removing doubts about a particular juror's impartiality and competence, especially when the vote of one biased juror can make a critical difference.

Then, too, "the role of the litigants in determining the jury's composition provides one reason for wide acceptance of the jury system and of its verdicts." Edmonson, 111 S.Ct. at 2088 (quoted in McCollum, 112 S.Ct. at 2358). The randomness built into the jury pool to obtain a cross-section can seem, to the apprehensive litigant, to be arbitrary and unfair, leaving the litigant to the "luck of the draw." The peremptory alleviates this apprehensiveness by allowing the parties to exercise their own intuitive judgment with respect to perceived juror bias.

It is against this background then that we consider extending the Batson challenge to religion. As we have noted, Batson is directed at the use of peremptories for purposeful race discrimination. "The reality of practice, amply reflected in many state- and federal-court opinions, shows that the challenge may be, and unfortunately at times has been, used to discriminate against black jurors." Id. at 99. And Justice Marshall, concurring, pointed out, "Misuse of the peremptory challenge to exclude black jurors has become both common and flagrant." Id. at 103. See also Swain, 380 U.S. at 231-39 (Justice Goldberg's dissent detailing deplorable racial problems with jury selection). Because of these serious and well-documented conditions, the United States Supreme Court has ruled that a party exercising a peremptory which is prima facie race-oriented should be called to account.

The use of the peremptory strike to discriminate purposefully on the basis of religion does not, however, appear to be common and flagrant. We are not aware the peremptory is being so misused, nor does the defendant make any such claim. No such problem is documented

in appellate court decisions.[3] This is not to say that religious intolerance does not exist in our society, but only to say that there is no indication that irrational religious bias so pervades the peremptory challenge as to undermine the integrity of the jury system.

Then, too, the nature of the bias sought to be eliminated by a Batson challenge is particularly illusive in the case of religion. Presumably, the bias sought to be eliminated in jury deliberations is intolerance for the doctrinal beliefs and practices of the adherents of a particular religious group. Yet when religious beliefs translate into judgments on the merits of the cause to be judged, it is difficult to distinguish, in challenging a juror, between an impermissible bias on the basis of religious affiliation and a permissible religion-neutral explanation. In the case before us, for example, would the explanation that the juror was "reluctant to exercise authority over their fellow human beings" be sufficient to overcome a prima facie case of religious bias? A juror's religious beliefs are inviolate, but when they are the basis for a person's moral values and produce societal views on such matters as the use of intoxicating liquor, cohabitation, necessity of medical treatment, civil disobedience, and the like, it would not seem that a peremptory strike based on these societal views should be attributed to a pernicious religious bias.

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[3] In People v. Wheeler, 583 P.2d 748, 761-62 (Cal. 1978); Commonwealth v. Soares, 387 N.E.2d 499, 516 (Mass. 1979), cert. denied, 444 U.S. 881 (1979); and State v. Gilmore, 511 A.2d 1150, 1159 (N.J. 1986), state supreme courts barred the use of peremptories based on group bias for race, sex, religion, or national origin. All of these cases, however, dealt specifically with racial bias and no evidence of group bias with respect to religious affiliation in jury selection was presented or suggested. Instead, the cases, all decided before Batson, were decided on the "fair cross-section" theory applied to petit juries, a theory since rejected by the United States Supreme Court in Holland v. Illinois, 493 U.S. 474 (1990).

There is authority that the religious beliefs of a juror may provide a race-neutral reason for a Batson challenge. E.g., United States v. Clemmons, 892 F.2d 1153, 1157 (3rd Cir. 1989), cert. denied, 496 U.S. 927 (1990); People v. Malone, 570 N.E.2d 584, 588-89 (Ill.App.Ct. 1991), appeal denied, 584 N.E.2d 135 (Ill. 1991).

Furthermore, religious affiliation (or lack thereof) is not as self-evident as race or gender. Consequently, for every peremptory strike, opposing counsel could demand a religion-neutral explanation. This would unduly complicate voir dire and be excessively intrusive for the end sought to be achieved. Cf. Holland v. Illinois, 493 U.S. 474, at 484 (1990) (rejecting Sixth Amendment "fair cross-section" requirement for petit jurors because this would amount, as a practical matter, to the elimination of peremptory challenges).

Because religious bigotry in the use of the peremptory challenge is not as prevalent, or flagrant, or historicaliy ingrained in the jury selection process as is race, we conclude that neither the federal nor our state constitution requires an extension of Batson. To extend Batson would complicate and erode the peremptory challenge procedure unnecessarily, and it would not serve to remedy any long-standing injustice perpetrated by the court system against specific individuals and classes, as Batson clearly does. We decline, therefore, to extend Batson to religious affiliation.

Justice O'Connor speaks of Batson aptly as "a special rule of relevance." Brown v. North Carolina, 479 U.S. 940, 942 (1986) (O'Connor, J., concurring in denial of certiorari). It is the "painful social reality" of racial discrimination which acts in a special, institutional sense to implicate the Equal Protection Clause. This implication is lacking for religious affiliation. Consequently, "[o]utside the uniquely sensitive area of race the ordinary rule that a prosecutor may strike without giving any reason applies." Id., at 942.

This case serves too, we think, to put in perspective the role of "relevance" in both its common law and its constitutional sense. Here the prosecutor announced a presumed group bias. She said she would strike not just this juror but any Jehovah's Witness. But defendant's

challenge was only to racial bias. The prosecutor was not advised the State was being charged with religious bias, if, indeed, that charge was being made, which is not at all clear.[4]

If the prosecutor had said no more than she was striking the black juror because he was a Jehovah's Witness, we think this would not have rebutted the prima facie case of racial bias, anymore than if the prosecutor had said she was striking because the black juror was a Lutheran, a Baptist, or a Muslim. In fact, however, the prosecutor went on to explain the reason for her challenge, pointing out Jehovah's Witnesses, as a group, were reluctant to exercise civil authority over other people and that the juror was a devoted member of that religious group.[5]

Ordinarily at common law, inquiry on voir dire into a juror's religious affiliation and beliefs is irrelevant and prejudicial, and to ask such questions is improper. Questions about

---

[4] During voir dire, at conference in chambers, defense counsel stated for the record:

> "[I]t's my understanding when there is a juror struck even for a preemptory [sic] challenge that's the same race as the defendant, the defense can request that the State at least put on the record its reason for challenging of that individual juror and I'm requesting that at this time."

At this point the prosecutor gave her explanation about Jehovah's Witnesses as quoted in the beginning of this opinion. When she finished, the court said to defense counsel, "Any comments?" Defense counsel answered, "No, Your Honor." Transcript of Proceedings, Jan. 3, 1992, pp. 107-08. The record does not tell us when it occurred to the defendant to raise a religious bias claim, but apparently it was after the trial.

[5] "The Witnesses claim to base all their teachings on the Bible, which they accept as literally true. * * * In the U. S. the society has taken 45 cases to the Supreme Court and has won significant victories for freedom of religion and speech."

"The Witnesses also stand apart from civil society, refusing to vote, run for public office, serve in any armed forces, salute the flag, stand for the national anthem, or recite the pledge of allegiance." The New Encyclopaedea Britannica, Vol. 10, p. 131, 132. See also In re Jenison Contempt Proceedings, 265 Minn. 96, 120 N.W.2d 515, judgment vacated, 375 U.S. 14 (1963), on remand 267 Minn. 136, 125 N.W.2d 588 (1963) (juror refusing to serve on petit jury because of the Biblical injunction, "Judge not, so you will not be judged.").

religious beliefs are relevant only if pertinent to religious issues involved in the case, or if a religious organization is a party, or if the information is a necessary predicate for a voir dire challenge. Coleman v. United States, 379 A.2d 951, 954 (D.C. 1977). See, e.g., United States v. Schullo, 390 F.Supp. 1067 (D. Minn. 1975) (Devitt, J.) (in an illegal gambling case, jurors asked by court if they had any moral or religious feelings about gambling so that they could not be fair and impartial). The trial court, in the exercise of its discretion, controls the questions that can be asked to keep the voir dire within relevant bounds. In this case, we do not know how the juror's religious affiliation came to light, but proper questioning for a challenge should be limited to asking jurors if they knew of any reason why they could not sit, if they would have any difficulty in following the law as given by the court, or if they would have any difficulty in sitting in judgment.

Affirmed.

WAHL, Justice (dissenting).

I respectfully dissent.

We deal here not with whether direct voir dire inquiry into religious affiliation of individual jurors ought generally to be allowed. I agree with the majority that such inquiry generally, although not necessarily always, is improper.

Rather, we deal with whether the Constitution allows purposeful discrimination in jury selection on the basis of religious affiliation. The majority, alluding to Justice Holmes' famous aphorism, says that if the life of the law were logic rather than experience, then it might follow from Batson v. Kentucky, 476 U.S. 79 (1986), and subsequent cases, that the Constitution does not allow purposeful discrimination in jury selection on the basis of religious affiliation. In my view, the dilemma between logic and experience posed by the majority is a false one in this case. In any event, the very words used by the United States Supreme Court in several of its relevant decisions support my conclusion that the Constitution does not allow purposeful discrimination in jury selection on the basis of religious affiliation.

Near the end of its opinion in Georgia v. McCollum, 112 S. Ct. 2348 (1992), the Court said:

> But there is a distinction between exercising a peremptory challenge to discriminate invidiously against jurors on account of race and exercising a peremptory challenge to remove an individual juror who harbors racial prejudice. This Court firmly has rejected the view that assumptions of partiality based on race provide a legitimate basis for disqualifying a person as an impartial juror. As this Court stated just last Term in Powers, "[w]e may not accept as a defense to racial discrimination the very stereotype the law condemns." 499 U.S., at ___, 111 S. Ct., at 1370. "In our heterogeneous society policy as well as constitutional considerations militate against the divisive assumption--as a per se rule--that justice in a court of law may turn upon the pigmentation

> of skin, the accident of birth, or the choice of religion." Ristaino v. Ross, 424 U.S. 589, 596, n.8, 96 S. Ct. 1017, 1021, n.8, 47 L.Ed.2d 258 (1976). We therefore reaffirm today that the exercise of a peremptory challenge must not be based on either the race of the juror or the racial stereotypes held by the party.

Id. at 2359 (emphasis added).

In Ristaino v. Ross, 424 U.S. 589 (1976), the Court held that the Constitution does not require that voir dire inquiry into racial prejudice by individual jurors generally be allowed. The Ristaino Court also said:

> At least where crimes of violence are involved, [defendant] would require defense motions for voir dire on racial prejudice to be granted in any case where the defendant was of a different race from the victim. He would require a similar result whenever any defendant sought voir dire on racial prejudice because of the race of his own or adverse witnesses. We note that such a per se rule could not, in principle, be limited to cases involving possible racial prejudice. It would apply with equal force whenever voir dire questioning about ethnic origins was sought, and its logic could encompass questions concerning other factors, such as religious affiliation or national origin. In our heterogenous society policy as well as constitutional considerations militate against the divisive assumption--as a per se rule--that justice in a court of law may turn upon the pigmentation of skin, the accident of birth, or the choice of religion. * * *

Id. at 596 n.8 (citations omitted) (emphasis added). This suggests to me that the Court might hold that the Constitution does not require that voir dire inquiry into religious affiliation of individual jurors generally be allowed but that the Constitution also does not allow purposeful discrimination in jury selection on the basis of religious affiliation, since religious classifications, like racial ones, are subject to strict scrutiny.

As I said at the outset, I agree with the majority that inquiry on voir dire into religious affiliation of individual jurors generally is improper. Ordinarily there is no basis for such

inquiry. The preclusion of such inquiry in no way precludes counsel from asking other questions designed to uncover flaws in individual jurors that would render them unsuitable for jury service in a particular case.

In this case, however, the prosecutor in fact learned of the juror's religious affiliation and, for whatever reasons, expressly stated that the reason for striking the juror was the juror's religious affiliation, without any voir dire of the man as to whether that religious affiliation would interfere with his ability to be a fair juror and responsibly exercise his duties as a juror. When the record of discrimination on the basis of religious affiliation is so stark, this court ought to act. I would extend the holding of Batson v. Kentucky to peremptory strikes based on religious affiliation and grant the defendant a new trial.

Gardebring, J. I join in the dissent of Justice Wahl.

PAGE, Justice (dissenting).

I am in agreement with the dissent of Justice Wahl. I write separately because I believe that Minn. Stat. § 593.32 (1992) provides adequate grounds for resolution of this case, allowing us to avoid reaching the constitutional issues presented.

Under Minn. Stat. § 593.32, subd. 1, a citizen may not be excluded from jury service in Minnesota "on account of race, color, religion, sex, national origin, economic status, or a physical or sensory disability." Thus, if Minn. Stat. § 593.32 applies to the impaneling of juries, the prosecutor's conduct here is a clear violation. It is argued that the provisions of Minn. Stat. § 593.32, subd. 1, apply only to the selection of the jury pool and not to the impaneling of any given jury. However, subdivision 2 of Minn. Stat. § 593.32 suggests otherwise. Subdivision 2 states: "Nothing in subdivision 1 restricts the right to strike an individual from being impaneled on a jury for cause based on a showing that a physical or sensory disability will impair the juror's ability to try a particular case." (Emphasis added.) By implication, I read the language of subdivision 2 to say that subdivision 1 applies to the impaneling of juries as well as to creating jury pools. In addition, it would seem to make no sense for the legislature to provide for a system allowing an attorney to peremptorily challenge a juror because of that juror's religion while, at the same time, requiring the attorney to have cause in order to challenge a person with a physical or sensory disability. Therefore, I would hold that the prosecutor's challenge of the prospective juror in this case on the basis of that juror's religion violated Minn. Stat. § 593.32, and I would remand this case to the district court for a new trial.

APPENDIX B

Unpublished Opinion of Minnesota Court of Appeals

This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (1990).

RECEIVED
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STATE PUBLIC DEFENDER

STATE OF MINNESOTA

IN COURT OF APPEALS

C7-92-1037

Ramsey County
District Court File No. 9102096

Kalitowski, Judge

State of Minnesota,

Respondent,

Hubert H. Humphrey, III
Attorney General
Suite 1400, NCL Tower
445 Minnesota Street
St. Paul, MN 55101

Tom Foley
Ramsey County Attorney
350 St. Peter, Suite 400
St. Paul, MN 55102

vs.

Edward Lee Davis,
a/k/a Eddie Davis,

Appellant.

John M. Stuart
State Public Defender
Mark F. Anderson
Assistant State Public Defender
95 Law Center
University of Minnesota
Minneapolis, MN 55414

Filed January 5, 1993
Office of Appellate Courts

Considered and decided by Kalitowski, Presiding Judge, Norton, Judge, and Harten, Judge.

U N P U B L I S H E D O P I N I O N

KALITOWSKI, Judge

On appeal from a conviction for aggravated robbery, appellant contends the trial court abused its discretion by (1) allowing a peremptory challenge based on a potential juror's religion; (2) denying appellant's motion for a new trial because of newly

discovered evidence; and (3) allowing the use of Spreigl evidence. Appellant further claims the evidence was insufficient to sustain his conviction. We disagree and affirm.

D E C I S I O N

I.

During jury selection, the prosecutor used a peremptory challenge to exclude a black person from the jury, and appellant objected under Batson v. Kentucky, 476 U.S. 79, 89, 106 S. Ct. 1712, 1719 (1986). The prosecutor's explanation for the peremptory strike was that the potential juror was a Jehovah Witness and that in her experience, Jehovah Witnesses are reluctant to exercise authority over their fellow human beings. Appellant contends the peremptory challenge was objectionable under Batson because exclusion of a juror on the basis of religion is impermissible. We disagree.

A defendant may establish a prima facie case of racial discrimination by showing that one or more members of a racial minority have been peremptorily excluded from the jury. Batson, 476 U.S. at 96, 106 S. Ct. at 1722-23. The prosecutor's burden, after a prima facie case has been made, is to articulate a racially neutral explanation for the peremptory challenge. Id. at 97-98, 106 S. Ct. at 1723-24. The trial court's role is to determine if the prosecutor's response is genuine and not a pretext for discrimination, and its ruling is entitled to great deference on review. State v. Moore, 438 N.W.2d 101, 107 (Minn. 1989).

In Minnesota Batson challenges to a state's use of peremptory strikes have not been extended to alleged discriminatory exclusions which are not based on race. See State v. Everett, 472 N.W.2d 864, 869 (Minn. 1991) (Batson challenge not extended to age-based exercise of peremptory challenge). The record indicates the prosecutor's peremptory strike was based on a race-neutral factor.[1] Thus the trial court did not err in accepting the reason given by the prosecutor as sufficient to overcome any prima facie case of race-based discrimination.

II.

Appellant contends he is entitled to a new trial based upon his allegation of newly discovered evidence. Granting a new trial on grounds of newly discovered evidence rests largely in the discretion of the trial court. Such discretion is to be exercised cautiously and only in the interest of substantial justice. State v. Smith, 221 Minn. 359, 364, 22 N.W.2d 318, 321 (1946).

Prior to obtaining a trial on the basis of newly discovered evidence, appellant must establish:

> (1) that the evidence was not known to him or his counsel at the time of trial, (2) that his failure to learn of it before trial was not due to lack of diligence, (3) that the evidence is material (or, as we have sometimes said, is not impeaching, cumulative or doubtful), and (4) that the evidence will

[1] Several foreign jurisdictions have specifically held that a race-neutral explanation may be premised on a juror's religious beliefs. See, e.g., United States v. Clemens, 892 F.2d 1153, 1157 (3rd Cir. 1989), cert. denied, 496 U.S. 927, 110 S. Ct. 2623 (1990); People v. Malone, 570 N.E.2d 584, 588-89 (Ill. 1991), appeal denied, 584 N.E.2d 135 (1991); Chambers v. State, 724 S.W.2d 440, 442 (Tex. Ct. App. 1987), rev. refused (Tex. Mar. 23, 1988).

> probably produce either an acquittal at a retrial or a result more favorable to the petitioner.

Hathaway v. State, 434 N.W.2d 461, 463 (Minn. 1989) (quoting Race v. State, 417 N.W.2d 264, 266 (Minn. 1987)).

Here the "newly discovered" evidence could have been discovered with due diligence before trial. In the more than five months between appellant's arrest and trial it is reasonable that his alibi witness could have discovered the evidence by exercising due diligence in searching her personal papers.

In addition we cannot conclude that the new evidence would probably produce a more favorable result if the case were retried. There was a strong case against appellant including eyewitness identification of appellant and his car. There is nothing to suggest the jury would have believed appellant's alibi more readily with the alleged original receipt. The trial court did not abuse its discretion in denying appellant's motion for a new trial.

Appellant claims the trial court erred in applying Hathaway and seeks to have this case decided under State v. Caldwell, 322 N.W.2d 574 (Minn. 1982). Under Caldwell, a new trial may be granted when:

> (a) The court is reasonably well satisfied that the testimony given by a material witness is false;
>
> (b) That without it the jury might have reached a different conclusion;
>
> (c) That the party seeking a new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial.

Id. at 585 (quoting Larrison v. United States, 24 F.2d 82, 87-88 (7th Cir. 1928)).

We do not believe Caldwell applies. While the newly discovered evidence may contradict some of Frank Peterson's testimony, it does not show his testimony was false. See Dye v. State, 411 N.W.2d 897, 900 (Minn. App. 1987) (the mere fact that certain testimony was not identical with pretrial statements would not permit the inference that trial testimony was false), pet. for rev. denied (Minn. Oct. 28, 1987); cf. Potter v. State, 410 N.W.2d 364, 368 (Minn. App. 1987) (court should not grant a new trial based on recanted testimony unless court is reasonably certain the recantation is genuine). Also, as discussed above, there is nothing to indicate the jury might have reached a different result. Finally, appellant was neither taken by surprise nor did he learn of the alleged falsity after the trial. We conclude the trial court did not abuse its discretion by applying Hathaway and denying appellant's request for a new trial.

III.

Appellant in his pro se brief contends he was denied a fair trial by the state's use of Spreigl evidence without providing appellant timely written notice of intent to use the evidence as required by Minn. R. Crim. P. 7.02. However, the complained of evidence of other robberies was neutral as to appellant's involvement and was introduced only to show a basis for the police conduct that resulted in appellant's arrest. Spreigl notice provisions are not triggered by evidence of other crimes which is

"necessarily, but incidentally, a part of the substantive proof of the offense." State v. Martin, 293 Minn. 116, 128-29, 197 N.W.2d 219, 227 (1972); State v. Wahl, 394 N.W.2d 536, 568 (Minn. App. 1986), pet. for rev. denied (Minn. Nov. 19, 1986). Spreigl rules are also not invoked when the evidence of wrongdoing is neutral. See, e.g., State v. Salas, 306 N.W.2d 832, 836 (Minn. 1981). Under the facts of this case we conclude the evidence was not subject to Spreigl rules and appellant was not denied a fair trial.

IV.

Appellant in his pro se brief also contends the evidence was insufficient to support his conviction. Where there is a challenge to the sufficiency of the evidence, our review on appeal is limited to an analysis of the record to determine whether the evidence, viewed in the light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict they did. State v. Webb, 440 N.W.2d 426, 430 (Minn. 1989). A reviewing court must also assume "the jury believed the state's witnesses and disbelieved any evidence to the contrary." Moore, 438 N.W.2d at 108.

Here, there was sufficient evidence to support the jury's verdict that appellant was guilty of aggravated robbery in violation of Minn. Stat. § 609.245 (1990). Although there were inconsistencies regarding the circumstantial evidence surrounding the robbery, we must affirm the conviction where the circumstantial evidence was "consistent with guilt and, on the whole, inconsistent with any reasonable hypothesis of innocence." State v. Bergland,

290 Minn. 249, 253, 187 N.W.2d 622, 625 (1971). The record indicates the evidence, which included an eyewitness identification of appellant and his car, was sufficient to support appellant's conviction.

Affirmed.

Thomas Kalitowski 12-29-92

APPENDIX C

Judgment

STATE OF MINNESOTA

State of Minnesota,
Respondent,
vs
Edward Lee Davis, a/k/a
Eddie DAvis petitioner,
Appellant.

☒ Supreme Court
☐ Court Of Appeals

JUDGMENT

C7-92-1037
Appellate Court Case Number

9102096
Trial Court Case Number

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the judgment *of the Court below, herein appealed from, to wit, of the District Court within and for the County of* Ramsey *be and the same hereby is* affirmed

and that judgment be entered accordingly. A certified copy of the entry of judgment and the Court's decision is herein transmitted and made part of the remittitur.

Dated and signed: FOR THE COURT October 1, 1993 *Attest:* Frederick K. Grittner
Dated *Clerk of the Appellate Courts*

By: Julie A. Smith
Assistant Clerk

Form APL-310

STATE OF MINNESOTA

☑ Supreme Court
☐ Court Of Appeals

TRANSCRIPT OF JUDGMENT

I, Frederick K. Grittner, Clerk of the Appellate Courts, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my signature at the Minnesota Judicial Center,

in the City of St. Paul October 11 1993
Dated

Frederick K. Grittner
Clerk of the Appellate Courts

By: [signature]
Assistant Clerk

State of Minnesota, Court of Appeals
I hereby Certify that the foregoing instrument is a true and correct copy of the original as the same appears on record in my office this 11 day Oct
19 93

By [signature]
Asst. Deputy Clerk

APPENDIX D

Partial Transcript of Trial

STATE OF MINNESOTA IN DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

FILED
AUG 07 1992
RAMSEY DISTRICT COURT

State of Minnesota,

Plaintiff,

-vs- D.C. File No.: 9102096

Edward Lee Davis, Jr., Appellate Court File No.:

Defendant.

JAN 10 1992
RAMSEY PUBLIC DEFENDER

The above-entitled matter came duly on for hearing before the Honorable Allan R. Markert, Judge of Ramsey County District Court, on January 3, 1992, in the City of St. Paul, Minnesota.

APPEARANCES:

Susan E. Gaertner, Assistant Ramsey County Attorney, appeared for and on behalf of the State of Minnesota;

Joy Bartscher, Attorney at Law, Neighborhood Justice Center, appeared with and on behalf of the Defendant;

Ronald Losey, Official Court Reporter.

(Whereupon, this completes the Spreigl Hearing of January 9, 1992.)

(Whereupon, the following proceedings were heard on January 14, 1992 in chambers.)

MS. BARTSCHER: Your Honor, for the record, I'd made a motion. I'd never done this before so I am not sure if it's a motion or what the proper terminology is. Mr. Whitlock is more familiar with the case law and the specification but it's my understanding when there is a juror struck even for a preemptory challenge that's the same race as the defendant, the defense can request that the State at least put on the record its reason for challenging of that individual juror and I'm requesting that at this time.

MS. GAERTNER: I'm very familiar with the case law and I fully expected such a motion. I want to point out for the record that this juror in many respects would have been a very good juror for the State and that he was employed and has been for some time, is a family man. I had no reason to suspect that simply because he was a young black male he would unduly sympathize with the defendant. However it was highly significant to the State and I'm putting on the record that the man was a Jahovah Witness. I have a

great deal of familiarity with the sect of Jahovah's Witness. I would never, if I had a preemptory challenge left, strike or fail to strike a Jahovah Witness from my jury. In my experience with the Jahovah Witness faith that faith is very integral to their daily lives in many ways, many Christians are not. That was re-enforced at least three times a week he goes to church for separate meetings. The Jahovah Witness faith is of a mind the higher powers will take care of all things necessary. In my experience Jahovah Witness are reluctant to exercise authority over their fellow human beings in this Court House. I did not feel it appropriate to further pry into his -- into this line of questioning because in no way does the case law prohibit me from exercising a challenge on that grounds and that is exactly why I struck this person.

THE COURT: Any comments?

MS. BARTSCHER: No, Your Honor.

THE COURT: Preemptory challenge will stand and the record stands and speaks for itself.

(Whereupon, the following proceedings were heard, in chambers, on January 15, 1992.)

THE COURT: We are in chambers and both attorneys are present. We are making a record of the

ORIGINAL

Supreme Court, U.S.
FILED
NOV 24 1993
OFFICE OF THE CLERK

No. 93-6577

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

EDWARD LEE DAVIS,
a/k/a EDDIE DAVIS,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

HUBERT H. HUMPHREY, III.
Minnesota Attorney General

TOM FOLEY
Ramsey County Attorney

By: DARRELL C. HILL
Counsel of Record
Assistant Ramsey County Attorney

50 W. Kellogg Blvd., Suite 315
St. Paul, Minnesota 55102
Telephone: (612) 266-3076

Counsel For Respondent

QUESTION PRESENTED

Should the principles of Batson v. Kentucky, 476 U.S. 79 (1986) and its progeny be extended to other types of alleged discrimination when a Black venire person was subjected to a peremptory challenge based upon his religious affiliation as applied to the prosecutor's perception of his ability to sit in judgment of his fellow man?

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TABLE OF AUTHORITIES

No. 93-6577

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

EDWARD LEE DAVIS,
a/k/a EDDIE DAVIS,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A

WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

Respondent, State of Minnesota, respectfully prays that the Petition For A Writ of Certiorari be denied by this Court. The Minnesota Supreme Court opinion is reported as State v. Davis, 504 N.W.2d 767 (Minn. 1993) and is attached to the Petition as Appendix A.

STATEMENT OF THE CASE

The following is extracted directly from State v. Davis, 504 N.W.2d 767 (Minn. 1993) and provides a comprehensive Statement of the Case:

> "Defendant Edward Lee Davis, an African-American, was charged with aggravated robbery. No jurors were struck for cause during the jury selection. The defense, however, exercised four of its five peremptory strikes, while the State used one of its three. When the State used the one peremptory to strike a black man from the jury panel, defense counsel objected and asked for a race-neutral explanation. (Reference to footnote omitted.)
>
> The prosecutor, in response, stated for the record that the prospective juror would have been a very good juror for the State and that race had nothing to do with her decision to strike. She explained:
>
> > However it was highly significant to the State * * * that the man was a Jahovah [sic] Witness. I have a great deal of familiarity with the sect of Jahovah's Witness. I would never, if I had a preemptory [sic] challenge left, strike [--] or fail to strike a Jahovah Witness from my jury.
>
> She went on:
>
> > In my experience * * * that faith is very integral to their daily life in many ways, many Christians are not. That was reenforced at least three times a week he goes to church for separate meetings. The Jahovah Witness faith is of a mind the higher powers will take care of all things necessary. In my experience Jahovah Witness are reluctant to exercise authority over their fellow human beings in this Court House.
>
> The prosecutor concluded her statement by saying she did not feel it appropriate "to further pry" into this matter with the juror because there was no need to when exercising a peremptory on race-neutral grounds. Defense counsel had nothing further to

add, and the trial judge ruled the peremptory strike would stand."

Id., 504 N.W.2d at 768.

Petitioner was then subsequently convicted by the jury of Aggravated Robbery. The Minnesota Court of Appeals affirmed his conviction in an unpublished opinion, rejecting several different issues raised by Petitioner. See Petition For Writ Of Certiorari, Appendix B. The Minnesota Supreme Court accepted the case for further review, but only on the peremptory challenge issue. They, again, affirmed Petitioner's conviction.

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE DENIED

The case at bar does not present any special or important reasons why certiorari should be granted. Batson and its progeny, at this point in time, are clearly limited to race. Moreover, this case arises from a single incident peremptory challenge without any long-standing historical pattern of discrimination. There is no conflict in decisions that might necessitate review nor did the Minnesota Supreme Court misapply any controlling principles of constitutional law set forth by this Court. In addition, the decision below turns upon its own facts and will affect few other litigants.

1. Batson Was Based Upon A Historical Pattern Of Racial Discrimination

In Batson, this Court held that a prosecutor may not challenge potential jurors solely on account of their race and eased the evidentiary burden established in Swain v. Alabama, 380 U.S. 202 (1965) for making a prima facie showing of racial discrimination. Batson v. Kentucky, 476 U.S. at 89 and 91-93. This Court also emphasized that the result was necessitated by a pattern of racial discrimination that had existed for over a century. Id., 476 U.S. at 84-89.

In subsequent decisions, this Court made it clear that Batson was uniquely addressed to claims of racial bias and that race was simply unrelated to a person's fitness as a juror. See

e.g. Gray v. Mississippi, 481 U.S. 648, 672 (1987) (Powell, J. concurring); Brown v. North Carolina, 479 U.S. 940, 940-942 (1986) (O'Connor, J. concurring in denial of certiorari). Racial discrimination was also involved when this Court extended Batson to White defendants, civil cases, and criminal defense counsel. Powers v. Ohio, ___U.S.___, 111 S.Ct. 1364 (1991); Edmonson v. Leesville Concrete Co., ___U.S.___, 111 S.Ct. 2077 (1991); Georgia v. McCollum, ___U.S.___, 112 S.Ct. 2348 (1992). The fact that this Court had always applied Batson to racial discrimination was expressly recognized by the Minnesota Supreme Court. State v. Davis, 504 N.W.2d at 768.

It was not until last term that this Court agreed to hear a case applying Batson to other forms of discrimination, i.e., gender discrimination. See J.E.B. v. State of Alabama ex rel. T.B., No. 92-1239 (cert. granted May 17, 1993). Petitioner seeks to "piggy-back" upon this grant of certiorari and seek an even further extension to allegations of religious discrimination. However, there are at least two critical differences from J.E.B. which do not compel review in the case at bar.

First, there is no documented history of using peremptories to perpetrate religious bigotry which mandates action by this Court. As previously noted, such a historical pattern was an underlying factor in Batson and was also apparently crucial to this Court's decision to grant certiorari in J.E.B. See Respondent's Appendix A reporting the oral

argument of J.E.B. on November 2, 1993. The absence of such a pattern was important to the Minnesota Supreme Court, for there is no religious bias which undermines the integrity of the peremptory challenge or, indeed, the entire jury system. State v. Davis, 504 N.W.2d at 771. Religious bias is not as flagrant as race, or even gender, nor has it risen to such an intolerable level as to require intervention by this Court.

Secondly, there is no split in legal authority on the topic. The extension of Batson to gender discrimination has caused both State and Federal Courts to decide virtually identical cases in opposite ways. Contrast People v. Irizarry, 142 Misc. 2d 793, 536 N.Y.S.2d 630 (N.Y. Sup. 1988) (extending Batson) and United States v. DeGross, 913 F.2d 1417 (9th Cir. 1990), aff'd. en banc, 960 F.2d 1433 (9th Cir. 1992) (extending Batson) with J.E.B. v. State of Alabama ex. rel. T.B., 606 So.2d 156 (Ala. Civ. App. 1992), cert. granted ___U.S.___, 113 S.Ct. 2330 (1993) (refusing to extend Batson) and United States v. Hamilton, 850 F.2d 1038 (4th Cir. 1988), cert. denied 493 U.S. 1069 (1991) (refusing to extend Batson). As will be discussed infra, there is simply no split of authority on the issue of religious discrimination which this Court needs to resolve.

2. There Is No Split In Legal Authority Which Merits Review

Contrary to Petitioner's claim, a decision from this Court will not resolve any split among lower courts on the issue of whether a Batson challenge can be answered by religion-based reasons. See Petition, P.P. 8-9. It is not necessary because there is no such split on FEDERAL constitutional grounds.

There are many cases which recognize that the religious beliefs or affiliations of a juror may provide a race-neutral reason for a Batson challenge. See e.g. Chambers v. State, 724 S.W.2d 440 (Tex. App.-Houston 1987) (No purposeful discrimination when peremptory challenge of Black based upon Church of Christ religious preference); Johnson v. State, 740 S.W.2d 868 (Tex. App.-Houston 1987) (Race-neutral reason provided when juror's conscience and religious beliefs prohibited him from sitting in judgment against anyone); Salazar v. State, 745 S.W.2d 385 (Tex. App.-Fort Worth 1987), aff. after remand on procedural issue, 818 S.W.2d 405 (Tex. Cr. App. 1991) (No Batson violation when use of peremptory challenge based upon religious affiliation); Nicks v. State, 598 N.E.2d 520 (Ind. 1992) (No Batson violation when juror had moral reservations regarding passing judgment on others); People v. Malone, 211 Ill App.3d 628, 570 N.E.2d 584 (Ill. App. Dist. 1 1991), appeal denied 584 N.E.2d 135 (Ill. 1991) (Batson challenge overcome by reasons of potential juror's religious

beliefs which included daily Bible reading); United States v. Clemmons, 892 F.2d 1153 (3rd Cir. 1989), cert. denied 496 U.S. 927 (1990) (No Batson violation when prosecutor struck Indian juror based upon his Hindu religious beliefs); United States v. De La Rosa, 911 F.2d 985 (5th Cir. 1990), cert. denied ___U.S.___, 111 S.Ct. 2275 (1991) (Batson challenge overcome by prospective juror's employment with a church ministry). The latter two cases are particularly relevant in that this Court has implicitly agreed with the proposition that there is no reason to extend Batson to allegations of religious discrimination.

On the other hand, the four cases cited by Petitioner are all either pre-Batson decisions involving race which had been decided upon a theory that applied the fair cross-section requirement to petit juries and/or decided upon state constitutional grounds. See Petition, P. 8. This Court has expressly rejected the former theory in a subsequent case and the Minnesota Supreme Court specifically refused to make Petitioner's requested extension under State constitutional principles. Holland v. Illinois, 493 U.S. 474 (1990); State v. Davis, 504 N.W.2d at 771. Thus, there is no federal constitutional split to resolve.

3. The Facts Of This Case Require Denial Of Certiorari

Even if this Court were inclined to grant certiorari and extend Batson to religion, this is plainly not the appropriate

case to do it. It is important to note that this is NOT a case where the peremptory challenge was premised solely upon a juror's affiliation as a Catholic, Lutheran, or even a Jehovah's Witness. Rather, it was a strike where the religious justification was clearly intertwined with some uncontested perceptions at the trial level about the person's ability to serve. Cf. State v. Davis, 504 N.W.2d at 772, n.4.

The record reflects that the venire person was an active member of the Jehovah Witness group. As stated by the prosecutor, the sect believes that higher powers will take care of all things and that group members are reluctant to exercise authority over their fellow human beings. See Petition, Appendix D. The validity of these perceptions has never been contested by Petitioner. Thus, her reasons, while having religious undertones, were founded upon a perception that this particular venire person may have a difficult time fulfilling his role as a juror. This, of course, is a far cry from blatant religious discrimination that is totally unrelated to an individual's fitness as a juror.

There is no question that the above was an important and crucial factor in the Minnesota Supreme Court decision. State v. Davis, 504 N.W.2d at 772. Without the connection between religion and the potential juror's ability to serve, the Batson prima facie case of discrimination would not have been overcome. Id. Therefore, there is no danger that the Minnesota Supreme

Court will allow unfettered religious discrimination in the exercise of peremptory challenges which requires intervention by this Court. The decision below clearly turned upon its own unique facts and will affect few other litigants.

In summary, petitioner has not presented any compelling reasons why certiorari should be granted. This case involved a single peremptory strike with some religious justification that focused directly on the person's perceived ability to serve; it did not involve any long-standing historical pattern of discrimination which may impair the integrity of the entire jury system. Cf. State v. Davis, 504 N.W.2d at 770.

CONCLUSION

For the reasons stated herein, the Petition For A Writ Of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

New York Times Article of November 3, 1993 reporting oral argument in J.E.B. v. T.B., No. 92-1239 which occurred before this Court on November 2, 1993

Juror-Selection by Sex Is Weighed by Justices

By LINDA GREENHOUSE
Special to The New York Times

WASHINGTON, Nov. 2 — After all but eliminating race as a factor in jury selection over the last seven years, the Supreme Court today turned to the question of whether lawyers can remove potential jurors on the basis of their sex.

With the support of the Clinton Administration, a lawyer for a man who lost a paternity case before an Alabama jury of 12 women argued that the same constitutional principle of equal protection applied to considerations of sex as well as race in jury selection.

The State of Alabama, seeking in a civil trial to establish the man's paternity, used its jury challenges to remove men from the jury pool, a tactic that most state and Federal courts allow.

"Injury to the entire community" results from the exclusion of any group of jurors on the basis of "group bias and unwarranted stereotypes," the defendant's lawyer, John F. Porter 3d, told the Court in language that reflected the Justices' reasoning in the cases on race in jury challenges.

Mr. Porter argued that it was a logical next step to extend to sex the Court's precedents on race and jury selection that began with a 1986 landmark ruling, Batson v. Kentucky. But it was clear from the argument that this was a step that at least some Justices were reluctant to take.

"Is there nothing to the notion that a rape defendant or the defendant in a paternity case is worse off with an all-female jury?" Justice Antonin Scalia asked. "Is that really an 'unwarranted' stereotype?"

"Men and women have the same ability to be unbiased jurors," Mr. Porter replied.

"But they begin from different starting points on different issues," Justice Scalia persisted. "Is there nothing to the fact that men and women have different outlooks?"

When Mr. Porter said that the probability that most women might have one point of view did not justify excluding all women, Justice Scalia interrupted to exclaim, "But that's what peremptory challenges are all about — playing the odds!"

As opposed to challenges for cause, by which jurors who have opinions about a case or connections to it are removed from the panel, peremptory challenges do not require a lawyer to state any reason for removing a juror. American courts inherited peremptory challenges from the English jury system. Under the Supreme Court's Batson decision and subsequent rulings barring race as a basis for peremptory challenges, a judge may require lawyers to explain their use of peremptory challenges if they appear to be trying to shape a jury of one race or another.

> If a juror's sex matters, what about religion, or age?

One concern evident in the courtroom today was whether the addition of sex as a prohibited factor in jury selection would inevitably mean that religion, national origin, age and perhaps other factors would also be added to the prohibited list, with the result that there would essentially be nothing left to peremptory challenges.

Lois N. Brasfield, an Alabama Assistant Attorney General who was arguing against extending the Batson decision to sex, said that given the nation's history, race was a unique factor at which the Court should draw the line.

But Justices Sandra Day O'Connor and Ruth Bader Ginsburg both noted that Alabama had excluded women entirely from jury service until 1967, after the Supreme Court declared the practice unconstitutional. In light of that history, the analysis of the Batson decision cannot so easily be confined to race, Justice O'Connor said.

"I guess the Court has painted itself into a corner," she said, noting that under the Court's analysis in Batson, "the juror's own rights are at stake." Addressing Ms. Brasfield, Justice O'Connor asked: "How would you not apply that rule? How can you make a reasonable argument in light of this Court's jurisprudence?"

"No juror has a right to sit on a particular case," Ms. Brasfield replied.

"Yes, but particular jurors have a right not to have the state exclude them because of gender," Justice O'Connor said.

Justice Ginsburg said that because neither blacks nor women were historically permitted to serve on juries, barring the use of sex as well as race in jury selection would simply "be putting the peremptory challenge back where it was in the bad old days."

In lower court cases raising the issue, the Bush Administration had argued against extending the Batson precedent to sex. The Clinton Administration's Solicitor General, Drew S. Days 3d, changed the Government's position after the Supreme Court granted review in this case in May.

Michael R. Dreeben, an Assistant Solicitor General, told the Court today that "the community's confidence in the integrity of the process" was undermined by the exclusion of jurors on the basis of sex.

In this case, J.E.B. v. T.B., No. 92-1239, the defendant's lawyer had used his own peremptory challenges to remove women from the jury, just as the state had removed men. But because there happened to be twice as many women as men on the panel from which the jury was selected, the lawyers' duel ended with an all-female jury. The Alabama Supreme Court rejected the man's challenge to the constitutionality of the selection process.

Although he denied paternity, a blood test showed a 99.82 percent probability that the man, James E. Bowman Sr., was the father of a baby born to Teresia Bibb.

"I don't think he was found to be the father of the child because of a biased all-female jury, but because of the overwhelming evidence," Ms. Brasfield, the state's lawyer, told the Court.

SUPREME COURT OF THE UNITED STATES

EDWARD LEE DAVIS *v.* MINNESOTA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

No. 93–6577. Decided May 23, 1994

The petition for a writ of certiorari is denied.

JUSTICE GINSBURG, concurring in denial of certiorari.

I write only to note that the dissent's portrayal of the opinion of the Minnesota Supreme Court is incomplete. That court made two key observations: (1) "[R]eligious affiliation (or lack thereof) is not as self-evident as race or gender," *State* v. *Davis*, 504 N. W. 2d 767, 771 (Minn. 1993); (2) "Ordinarily . . . , inquiry on voir dire into a juror's religious affiliation and beliefs is irrelevant and prejudicial, and to ask such questions is improper." *Id.*, at 772 (adding that "proper questioning . . . should be limited to asking jurors if they knew of any reason why they could not sit, if they would have any difficulty in following the law as given by the court, or if they would have any difficulty in sitting in judgment").

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

During jury selection for petitioner's trial on a charge of aggravated robbery, the prosecutor used a peremptory strike to remove a black man from the venire. Petitioner, who is black, objected on *Batson* grounds and requested a race-neutral explanation for the strike. See *Batson* v. *Kentucky*, 476 U. S. 79, 97 (1986). The prosecutor responded that she had struck the venireman because he was a Jehovah's Witness and explained that "[i]n my experience Jahovah Witness [sic] are reluctant to exercise authority over their fellow human beings in this

Court House." 504 N. W. 2d 767, 768 (Minn. 1993). The trial court accepted that reason for the strike and proceeded to trial. Petitioner subsequently was convicted.

On appeal, petitioner conceded that the prosecutor's explanation for the strike was race-neutral, but contended that *Batson* should be extended to prohibit peremptory strikes based on religion. The Supreme Court of Minnesota rejected petitioner's *Batson* argument and affirmed the conviction. The court reasoned that this Court has never held that "*Batson* should extend beyond race-based peremptory challenges," and noted that "*Batson*, itself, speaks solely of the need to eradicate racial discrimination." *Ibid.* Acknowledging that "[i]f the life of the law were logic rather than experience, *Batson* might well be extended to include religious bias and, for that matter, an endless number of other biases," *id.*, at 769, the court nevertheless concluded that, because *Batson* had been confined by this Court to the context of race, it should not be broadened to reach petitioner's claim in this case. *Id.*, at 772.

I find it difficult to understand how the Court concludes today that the judgment of the court below should not be vacated and the case remanded in light of our recent decision in *J. E. B.* v. *Alabama ex rel. T. B.*, 511 U. S. ___ (1994), which shatters the Supreme Court of Minnesota's understanding that *Batson*'s equal protection analysis applies solely to racially based peremptory strikes. It is abundantly clear that the lower court was relying on just such a reading of *Batson*, for it reasoned that *Batson* embodies "'a special rule of relevance'" that operates only in the context of race, and concluded that "'[o]utside the uniquely sensitive area of race the ordinary rule that a prosecutor may strike without giving any reason applies.'" 504 N. W. 2d, at 771–772 (quoting *Brown* v. *North Carolina*, 479 U. S. 940, 942 (1986) (O'CONNOR, J., concurring in denial of certiorari)). In extending Equal Protection Clause analysis to prohibit strikes exercised on the basis of sex, *J. E. B.* explicitly disavowed that understanding of *Batson*.

Indeed, given the Court's rationale in *J. E. B.*, no principled reason immediately appears for declining to apply *Batson* to any strike based on a classification that is accorded heightened scrutiny under the Equal Protection Clause. The Court's decision in *J. E. B.* was explicitly grounded on a conclusion that peremptory strikes based on sex cannot survive "heightened scrutiny" under the Clause, 511 U. S., at ___ (slip op., at 10), because such strikes "are not substantially related to an important government objective." *Id.*, at ___, n. 6 (slip op., at 10, n. 6). In breaking the barrier between classifications that merit strict equal protection scrutiny and those that receive what we have termed "heightened" or "intermediate" scrutiny, *J. E. B.* would seem to have extended *Batson*'s equal protection analysis to all strikes based on the latter category of classifications—a category which presumably would include classifications based on religion. Cf. *Larson* v. *Valente*, 456 U. S. 228, 244–246 (1982); *Batson*, 476 U. S., at 124 (Burger, C. J., dissenting). It is at least not obvious, given the reasoning in *J. E. B.*, why peremptory strikes based on religious affiliation would survive equal protection analysis. As JUSTICE SCALIA pointed out in dissent, *J. E. B.* itself provided no rationale for distinguishing between strikes exercised on the basis of various classifications that receive heightened scrutiny, 511 U. S., at ___ (slip op., at 6), and the Supreme Court of Minnesota certainly did not develop such a distinction. As described above, the court relied expressly on the understanding that *Batson* was confined to the context of race. Under these circumstances, this case should be remanded for the Supreme Court of Minnesota to consider explicitly whether a principled basis exists for confining the holding in *J. E. B.* to the context of sex.

I can only conclude that the Court's decision to deny certiorari stems from an unwillingness to confront forthrightly the ramifications of the decision in *J. E. B.* It has long been recognized by some members of the Court that subjecting the peremptory strike to the rigors

of equal protection analysis may ultimately spell the doom of the strike altogether, because the peremptory challenge is by nature "'"an arbitrary and capricious right."'" *Batson*, *supra*, at 123 (Burger, C. J., dissenting) (quoting *Swain* v. *Alabama*, 380 U. S. 202, 219 (1965) (quoting *Lewis* v. *United States*, 146 U. S. 370, 378 (1892))). Cf. *J. E. B.*, *supra*, at ___ (slip op., at 6–7) (SCALIA, J., dissenting). Once the scope of the logic in *J. E. B.* is honestly acknowledged, it cannot be glibly asserted that the decision has no implications for peremptory strikes based on classifications other than sex, or that it does not imply further restrictions on the exercise of the peremptory strike outside the context of race and sex.

In my view, the petition should therefore be granted, the judgment below vacated, and the case remanded for reconsideration in light of *J. E. B.* I respectfully dissent.